

EXHIBIT E

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3

4 - - - - - x

5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS, INC., CAUSE NO.

7 et al, 08-13555 (JMP)

8 Debtors.

9 - - - - - x

10 In re

11 LEHMAN BROTHERS, INC., CAUSE NO.

12 Debtor. 08-01420 (JMP) (SIPA)

13 - - - - - -x

14

15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 November 14, 2012

20 10:02 AM

21

22 B E F O R E:

23 HON. JAMES M. PECK

24 U.S. BANKRUPTCY JUDGE

25 ECRO: MATTHEW

1 HEARING re Notice of Final Applications of Retained
2 Professionals for Final Allowance and Approval of
3 Compensation for Professional Services Rendered and
4 Reimbursement of Actual and Necessary Expenses Incurred from
5 September 15, 2008 to March 6, 2012 (ECF Nos. 31901)

6
7 HEARING re Plan Administrator's Cross-Motion to Compel
8 Giants Stadium LLC to comply with Rule 2004 Subpoenas and
9 Objection to Giants Stadium's Motion to Quash the Rule 2004
10 Subpoenas (ECF No. 31652)

11
12 HEARING re Motion to Quash a Subpoena filed by Bruce E.
13 Clark on behalf of Giants Stadium LLC (ECF No. 31339)

14
15 HEARING re Amended Motion of Giants Stadium LLC for Leave to
16 Conduct Discovery of the Debtors Pursuant to Federal Rule of
17 Bankruptcy Procedure 2004 (ECF No. 31105)

18
19 SIPA PROCEDURES

20 HEARING re Motion Pursuant to Federal Rule of Bankruptcy
21 Procedure 9019 for Entry of an Order Approving Settlement
22 Agreement Between the Trustee and Lehman Brothers Finance
23 AG, in Liquidation (a/k/a Lehman Brothers Finance SA, in
24 Liquidation) (LBI ECF No. 5362)

25

1 HEARING re Trustee's Motion Pursuant to Section 105(a) of
2 the Bankruptcy Code and Bankruptcy Rules 3007 and 9019(b)
3 for Approval of General Creditor Claim (I) Objections
4 Procedures and (II) Settlement Procedures (LBI ECF No. 5392)

5
6 HEARING re Debtor's Three Hundred Fifty-Seventh Omnibus
7 Objection to Claims (Misclassified Claims (ECF No. 31048)

8
9 HEARING re Objection to Claim No. 17763 Filed by Laurel Cove
10 Development, LLC (ECF No. 29187)

11
12 HEARING re Three Hundred Twentieth Omnibus Objection to
13 Claims (No Liability Rose Ranch LLC Claims) (ECF No. 29292)

14
15 HEARING re Debtor's Three Hundred Twenty-Ninth Omnibus
16 Objection to Claims (Misclassified Claims) (ECF No. 29324)

17
18 HEARING re Motion for an Order Pursuant to Section 105(a) of
19 the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing
20 and Approving the Settlement with Lehman Brothers, Inc. (ECF
21 No. 43)

22
23 HEARING re Turnberry Centra Sub, LLC et al v Lehman Brothers
24 Holdings, Inc., et al (Adversary Case No. 09-01062)

25 Transcribed by: Sheila Orms and William Garling

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES LLP

4 Attorneys for Lehman Brothers Holdings, Inc.

5 767 Fifth Avenue

6 New York, NY 10153

7

8 BY: RICHARD W. SLACK, ESQ.

9 JACQUELINE MARCUS, ESQ.

10 KYLE ORTIZ, ESQ.

11 CANDACE ARTHUR, ESQ.

12

13 WEIL, GOTHAL & MANGES LLP

14 Attorneys for Lehman Brothers Holdings, Inc.

15 1395 Brickett Avenue

16 Suite 1200

17 Miami, FL 33131

18

19 BY: EDWARD R. MCCARTHY, ESQ.

20

21

22

23

24

25

1 PAUL WEISS RIPKIND WHARTON & GARRISON LLP

2 Attorneys for Houlihan Lokey Howard & Zukin Capital,
3 Inc.

4 1295 Avenue of the Americas
5 New York, NY 10019

6
7 BY: ALAN W. KORNBERG, ESQ.

8 PHILLIP Q. WEINTRAUB, ESQ.

9
10 LATHAM & WATKINS LLP

11 Attorneys for Ernest & Young LLP
12 53rd at Third, 855 Third Avenue
13 New York, NY 10022

14
15 BY: MICHAEL RIELA, ESQ.

16
17 CARMODY MACDONALD

18 Attorneys for Alvarez & Marsal
19 120 S. Central Avenue
20 Suite 1800
21 St. Louis, MO 63105-1705

22
23 BY: GREGORY D. WILLARD, ESQ.

1 HUGHES HUBBARD

2 Attorneys for SIPA Trustee

3 One Battery Park Plaza

4 New York, NY 10004-1482

5

6 BY: JEFFREY S. MARGOLIN, ESQ.

7 JEFFREY M. GREILSHEIMER, ESQ.

8 MEAGHAN C. GRAGG, ESQ.

9

10 GODFREY KAHN S.C.

11 Attorneys for Fee Committee

12 One East Main Street

13 Suite 500

14 Madison, WI 54701

15

16 BY: KATHERINE STADLER, ESQ.

17 RICHARD GITLIN, ESQ.

18

19 SULLIVAN & CROMWELL, LLP

20 Attorneys for Giants Stadium

21 125 Broad Street

22 New York, NY 10004

23

24 BY: THOMAS JOHN WRIGHT, ESQ.

25 BRUCE E. CLARK, ESQ.

1 STAGG, TERENCE, CONFUSIONE & WAHNIK, LLP
2 Attorneys for Laurel Cove Development
3 401 Franklin Avenue
4 Suite 300
5 Garden City, NY 11530
6

7 BY: CARA M. GOLDSTEIN, ESQ.
8

9 DECHERT, LLP
10 Attorneys for ???
11 1095 Avenue of the Americas
12 New York, NY 10036
13

14 BY: NICOLE B. HERTHER-SPIRO, ESQ.
15

16 GIBSON DUNN
17 Attorneys for Lehman Brothers Finance AO
18 2100 McKinney Avenue
19 Dallas, TX 75201-6912
20

21 BY: ROBERT B. KRAKOW, ESQ.
22
23
24
25

1 CLEARY GOTTlieb STEEN & HAMILTON LLP

2 Attorneys for ???

3 One Liberty Plaza

4 New York, NY 10006

5

6 BY: JOSH E. ANDERSON, ESQ.

7

8 MEISTER SEELIG & FEIN LLP

9 Attorneys for ???

10 2 Grand Central Tower

11 140 East 45h Street

12 19th Floor

13 New York, NY 10017

14

15 BY: STEPHEN B. MEISTER, ESQ.

16

17 UNITED STATES DEPARTMENT OF JUSTICE

18 Attorney for the Office of the United States Trustee

19 76 Chapel Street, Suite 200

20 Albany, NY 12207

21

22 BY: SUSAN GOLDEN, ESQ. (TELEPHONICALLY)

23

24 OTHERS PRESENT:

25 THERESA CARPENTER, BREGAL INVESTMENTS, INC.

1 TELEPHONIC APPEARANCES:

2

3 ANASTOLY BUSHLER, FARALLON CAPITAL MANAGEMENT

4 JEFFREY H. DAVIDSON, STUTMAN, TRIESTER & GLATT

5 NICK LANE, WITNESS, WEIL, GOTSHAL & MANGES LLP

6 TRISTA S. LYONS, PRO SE

7 MICHAEL NEUMEISTER, STUTMAN, TREISTER & GLATT

8 MITCHELL SOCKETT, KING STREET CAPITAL MANAGEMENT, LLC

9 KATHERINE A. TRADER, PAUL HASTINGS, LLP

10 JEFFREY H. DAVIDSON, STUTMAN, TREISTER & GLATT

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 would like you to focus on in your presentation.

2 MR. SLACK: Okay. So, Your Honor, Richard Slack
3 from Weil Gotshal on behalf of the plan administrator and
4 Lehman.

5 MR. CLARK: Good morning, Your Honor, Bruce Clark
6 from Sullivan and Cromwell for Giant Stadium. With me is my
7 colleague Thomas Wright.

8 MR. WRIGHT: Good morning, Your Honor.

9 THE COURT: Good morning. Okay. It's my
10 recollection and the recollection has been reinforced by
11 reviewing the papers that we last had a discovery argument
12 in connection with 2004 discovery in September of last year,
13 approximately 14 months ago.

14 The papers that I have read provide different
15 perspectives of what has occurred over the last 14 months.
16 But to me one of the revelations is that the claim
17 originally held by Giant Stadium is now held by an entity
18 affiliated with Baupost called Goal Line, and that an
19 intermediate transferee was Bank of America.

20 To me this is a result of -- as a result of this
21 revelation to me this becomes one of the first examples
22 presented to me in this case, although I'm sure there are
23 many others that are invisible to me, of the phenomenon
24 discussed by scholars as the so-called empty creditor.

25 The creditor that appears to have real party in

1 interest status in a bankruptcy case, but who has actually
2 divested itself of all or substantially all of the economics
3 associated with that creditor interest, and it may have
4 other disguised interests that impact that creditor's
5 motivation within the bankruptcy case.

6 Henry (indiscernible) a professor of law at the
7 University of Texas, who for a time had a senior position
8 with the SEC has written extensively on this subject. And I
9 am personally not only familiar with it, but interested in
10 it. I bring this up because one of my real concerns here is
11 that the papers disclose apparently heroic good faith
12 efforts to settle disputes between Giant Stadium on the one
13 hand, and Lehman on the other, but uncharacteristically this
14 is one of the few cases presented to me at least on the
15 current docket, I don't know what next year will bring, in
16 which parties that have sincerely attempted to resolve their
17 differences have failed in those efforts.

18 As I understand it, a mediator who is one of the
19 mediators quite skilled in dealing with derivative disputes
20 in the Lehman case participated in at least a one day
21 mediation session, and that that session ended with no
22 agreement, and that thereafter at some point, the parties
23 endeavored to try to restart discussions. And the current
24 flap, if I can call it that, with respect to discovery is a
25 manifestation of the ongoing antagonism between the parties.

1 To me, at least, the discovery dispute represents deflected
2 antagonism and is subtext for what is really the ongoing
3 unresolved business issues among the parties.

4 I will note the obvious, this Court and every other
5 Court in the nation despises discovery disputes that cannot
6 be rationally resolved by experienced counsel, and here we
7 have experienced and skilled counsel on both sides. The
8 papers are voluminous and include declarations, references
9 to the transcript from September of last year, and involve a
10 level of effort that to me seems disproportionate to the
11 issues that are in dispute.

12 And so I have the following questions. First, what
13 is the explanation for the increase in the purported claim
14 amount from \$301 million to \$585 million? How did that
15 happen, what's the justification for it, and has that been
16 the subject of negotiations between the parties?

17 Secondly, who is Lehman negotiating with when it
18 negotiates? Are you negotiating with counsel for Giant
19 Stadium or counsel for Goal Line?

20 Third, why is historical counsel for Giant Stadium
21 still here purporting to act on behalf of an historical
22 creditor when, in fact, the real economics in whole or in
23 part, are elsewhere? To what extent does this represent
24 independent judgment of Sullivan and Cromwell's client and
25 to what extent does it represent Sullivan and Cromwell, and

1 I hate to use the term, as a puppet for other parties that
2 are driving this bus?

3 Those are my questions, and I want them answered
4 before we get into the merits of the discovery dispute,
5 which as I said, appears to me to be largely a strategyn
6 chosen by both sides to get into court. I don't view it as
7 a real dispute. I know you do, and you're going to have to
8 justify to me why this isn't one of the biggest wastes of
9 time since this case began.

10 MR. SLACK: So, Your Honor, starting right with the
11 questions that you've asked. I think it's fair to say that
12 the debtor that Lehman thinks that the claim amount that was
13 essentially doubled was done purely for negotiating
14 purposes. In other words, only after this Court back in
15 September sent us back to mediate or essentially to try to
16 resolve it, the claim essentially doubled.

17 We haven't had a stitch of discovery on who made
18 that decision, why it was doubled, what the justification
19 is. Obviously, they gave us a piece of paper, but unlike
20 the original 301 million, we haven't had any discovery
21 whatsoever under 2004 about that.

22 In terms of whether those matters were the subject
23 of negotiation, let me put it this way. Obviously the
24 parties had discussion over the amount of the claim, and
25 there was discussion about the amounts of the claim. I

1 don't think it's fair to say, however, that the debtor has
2 insight as to why it was done, what's the timing of it, what
3 the basis of it is. We haven't had insight into any of
4 that.

5 THE COURT: Well, let me just ask you a question,
6 and I don't want to know anything about the substance of the
7 negotiations that took place between the parties. But isn't
8 the first question that somebody sitting down to the
9 negotiating table would ask given this fact pattern, how on
10 earth can you justify an increase from \$301 million to \$585
11 million, what's that about? Isn't that the first question?
12 Perhaps not expressed in that way, but I think there would
13 be an element of huge exasperation built in the question.

14 MR. SLACK: There is that exasperation, and I'm
15 sure those were the subject of discussions, and again, there
16 was a piece of paper that's filed. There is an amended
17 claim that was filed. So, I mean, to the extent that
18 there's an amended claim, we could look at it and say here's
19 what's in it. But in terms of why it was done, who made
20 that decision, why didn't their original financial advisor,
21 Goldman, reach that amount, you know, two and a half years
22 earlier.

23 Again, we haven't had any kind of insight into any
24 of those kinds of questions, and those have not been
25 answered. And, of course, that's one of the reasons that we

1 wanted to continue the investigation. So that's, I think,
2 at least from our perspective, you may get another
3 perspective the answer to number one.

4 In terms of number two, at some point we were
5 informed once Baupost, Goal Line acquired the interest that
6 Sullivan and Cromwell was going to jointly represent Giant
7 Stadium and Goal Line. And so there have been
8 representatives, you know, Sullivan and Cromwell's been
9 involved, Baupost has been involved, and representatives
10 from Giant Stadium have been involved in the negotiations
11 throughout this period.

12 Now, that's not to say that every conversation
13 included representatives of all, but all parties at some
14 level have been involved in negotiations over the past year.

15 And I think that's -- I think that that somewhat
16 answers at least what we know about question three, which is
17 why is Sullivan and Cromwell still representing Giants. My
18 understanding again is that they're jointly representing
19 Giants and Baupost and Goal Line in connection with this.

20 What I can say is again, we haven't had any
21 discovery into that sale. We haven't seen the actual
22 transfer papers between Baupost, and I guess it's Bank of
23 America. We did see the original papers between Giants and
24 Bank of America. That's one of the things we asked for
25 again in our two thousand and --

1 THE COURT: Why is that even relevant at this
2 point?

3 MR. SLACK: The only thing that potentially is
4 relevant is exactly I think the questions that you're
5 asking. We need to understand when we're talking to
6 somebody, for example, who is the interest. Who should we
7 be talking to Baupost or not. And that was part of it.

8 The other thing is, Baupost and Giant Stadium were
9 on opposite sides of that deal. I think we were entitled to
10 see what was disclosed during those negotiations, and we've
11 asked to see that. And we -- they're not privileged, and we
12 should have access to it.

13 THE COURT: Well, whether you should or should not
14 have access to it, I'm just going to make the general
15 observation that ordinarily when claims are transferred and
16 the Lehman case has been one of the largest unregulated
17 trading markets and distressed claims in the world during
18 the past four years. There's a routine that I'm familiar
19 with not from being a Judge, but having been a practitioner,
20 and you're not likely to find very much of value in the back
21 and forth relating to that claim tread, at least as it
22 relates to the value for purposes of any objection you might
23 file.

24 These are trades between so-called big boys, and
25 everybody makes their own judgments as to the likelihood of

1 success in future litigation with regard to the claim. You
2 may or may not be ultimately entitled to obtain that
3 information, but even if you do, in my view, it's a big so
4 what.

5 MR. SLACK: Might be. Look, you know, what you're
6 saying obviously from experience makes sense. What I would
7 say, Your Honor, is that this is a little bit unlike other
8 claims, in that it's obviously a very large one. It's
9 obviously unliquidated. It's obviously the main issues that
10 somebody looking to buy it are going to be asking themselves
11 are, at the end of the day, is it a receivable or is it a
12 payable, and if so, how much.

13 So I think, you know, it's a little bit different
14 than, you know, a claims market with liquidated claims.
15 But, you know, that's just the tiniest piece of what, you
16 know, we were seeking in our 2004.

17 So, Your Honor, would you like to hear the answers
18 to those questions from counsel, or would you like me to go
19 ahead with my argument? I mean --

20 THE COURT: I'd like to hear what counsel for Giant
21 Stadium has to say about the big picture questions that I
22 raised. And one of the reasons why I'm focused on this is
23 that I am concerned about more than the discovery dispute
24 that has been presented to me, I'm frankly concerned as to
25 why we're having the dispute at all, and why this claim is

1 different from other claims, so many of which have already
2 found their way into formal claims objections.

3 And I'm interested in that question, but before
4 getting to it, Mr. Slack, I'd like to hear comments from --

5 MR. SLACK: Okay.

6 THE COURT: -- counsel for Giant Stadium as to some
7 of the preliminary questions that I asked.

8 MR. SLACK: Sure.

9 MR. CLARK: Thank you, Your Honor. Again, Bruce
10 Clark for Giant Stadium.

11 Trying to take your questions in order, as to the
12 increase in the amount of the claim, when the claim was
13 originally filed, it was filed with five, I believe there
14 were five caveats as to items that have yet to be
15 quantified. And when the claim was revised at least two of
16 those items were the cause of the increase from 301 to 585
17 million.

18 One of them reflects the amount of a capital
19 charge, which the person stepping into the shoes of Lehman,
20 in our view, would've had to incur, in order to protect
21 themselves by way of reserves against the likelihood of a
22 further default. And the other was a difference in the
23 credit charge. That difference came about because the
24 original deal with Lehman involved raps by insurance
25 companies, either Figik (ph) or FSA, both of whom at the

1 time of the transaction reviewed were rated as AAA credits
2 in the market. And at the time of the putting out of the
3 proof of claim, the amended proof of claim, we quantified an
4 additional amount because those protections were gone. And
5 the amount that one would have to pay to get the equivalent
6 protection was greatly increased.

7 And I am not, I've got to say, I'm not trying to
8 duck this, but I am not the person who has studied this in
9 the last month and really can give you a better answer. But
10 that's my understanding of the two principal reasons that
11 the amount was increased between the first claim and the
12 second claim.

13 THE COURT: Okay.

14 MR. CLARK: As to --

15 THE COURT: Has that information which you just
16 shared with me previously been shared with Lehman when --

17 MR. CLARK: Yes.

18 THE COURT: Okay.

19 MR. CLARK: I mean, as Mr. Slack said, it's in the
20 -- a description of that much is in the amended proof of
21 claim, and neither Weil nor we particularly want to go --
22 and should go into the specifics of the conversations. But
23 the conversations during the settlement talks centered on
24 this and a lot of other points.

25 I don't know if the question you asked why did you

1 increase the 301 to 585 was the first question that came up.

2 But it certainly was a question that was explored.

3 THE COURT: Assumingly if I were on the receiving
4 end of a claim like that, even if we were talking about
5 hundreds of dollars instead of millions of dollars, the
6 first question I would ask, how on earth could you be
7 claiming that much more.

8 MR. CLARK: I think --

9 THE COURT: How did this claim double?

10 MR. CLARK: I think you're being more courteous
11 than the words I heard when the question was asked.

12 THE COURT: Okay. Well then --

13 MR. CLARK: And clearly that was asked.

14 THE COURT: Well, I'm in court so I have to be
15 courteous.

16 MR. CLARK: Right. But that -- I mean, my best
17 recollection is that was discussed. As Mr. Slack said, a
18 lot of the conversations in these settlement talks took
19 place with different people from the interested parties at
20 different times, and neither of us was party to all of them
21 by any means.

22 THE COURT: Okay.

23 MR. CLARK: I'd be astonished if that was not
24 talked at length.

25 Second, who was Lehman negotiating with, I agree

1 with what Mr. Slack said. I think I just said the same
2 thing, but they were negotiating with people from Sullivan
3 and Cromwell. We are representing both Baupost and Giant
4 Stadium. They were all negotiating with people from Baupost
5 at the same time, and Giant Stadium people as well. And
6 there were a variety of people on the Lehman side. I mean,
7 there must have been 20 that I met at one time or another.

8 So it was a very active negotiation or series of
9 negotiations over that time period.

10 THE COURT: One of my fundamental questions is
11 whether Giant Stadium has continuing economic interest in
12 this claim or is a so-called empty creditor. Is it an empty
13 creditor?

14 MR. CLARK: No, it's not. The reason it's not is
15 because the sale papers between Giant Stadium and Bank of
16 America which the debtors do have, and which they did ask
17 questions about in the deposition, make it clear that Giant
18 Stadium has a contingent interest in the result of the
19 negotiation or resolution of the claim. It depends on how
20 much is paid or how much is not paid. They do have a
21 material interest one way or another.

22 THE COURT: So as a kicker?

23 MR. CLARK: It's either a kicker or a pay back or a
24 clawback, one or the other.

25 THE COURT: Okay.

1 MR. CLARK: Okay. As to the question that came up
2 about the sale between Bank of America and Baupost, my
3 information on that is that Giant Stadium was not involved
4 in that. That was a transaction between Bank of America and
5 Baupost. They negotiated it. And I don't believe we have
6 anything certainly anything material to either produce or to
7 disclose about it. That is not a transaction that to my
8 knowledge, I just heard Mr. Slack say, they have information
9 about, but neither do we.

10 THE COURT: All right.

11 MR. CLARK: Have I addressed the preliminary
12 questions? I thought I took the list down right.

13 THE COURT: I think you have, although Mr. Slack
14 seems to want to interject at this point. Do you want to
15 proceed with your main argument?

16 MR. SLACK: Yeah, please, thank you, Your Honor.

17 THE COURT: And understand there is this other
18 question which in effect wraps all the other questions. Why
19 are we here with a discovery dispute as to a claim, that's
20 whether it's \$301 million claim or a \$585 million claim
21 appears at least in the Court's view to be more or less
22 indistinguishable from any number of other derivative type
23 claims in this bankruptcy case, and in effect, is a righted
24 question, are you gentlemen both serious about this dispute?

25 So much has gone into a 2004 examination request

1 and resisting that request and efforts to make it
2 reciprocal, that it raises more questions in the Court's
3 mind than it answers as to what's going on here. Now, I
4 want to know what's going on here.

5 MR. SLACK: Well, Your Honor, as I think you know
6 from the docket, the debtor has taken 2004 discovery with
7 respect to, you know, hundreds of counterparty, derivative
8 counterparties and we haven't had these issues. I mean, if
9 you think about the number of years that I've been before
10 you on matters, if we've had a couple of discovery disputes,
11 that's a lot.

12 And so I think we have a record frankly of these
13 kinds of situations, and this just hasn't gone the way of
14 the other ones. Because we have frankly been obstructed,
15 and we have a -- you know, we had a situation a year ago,
16 and that -- what happened a year ago in September is we had
17 another discovery dispute, and unfortunately, we had -- you
18 know, we listened to the Court tell us that frankly you
19 didn't like that discovery dispute.

20 THE COURT: I'll be very consistent. I'm not
21 likely to like any discovery dispute that you present to me.

22 MR. SLACK: But what happened in that hearing is
23 important for today. What happened in that hearing which
24 concerned a motion to compel Giant Stadium with respect to
25 privilege is Giant Stadium said, Your Honor, they won't talk

1 to us about the merits. They won't sit down with us and
2 talk. And I said, Your Honor, I was concerned. And my
3 concern was, we were in the middle of an investigation that
4 we had not finished, and we needed a little more time to get
5 it done, as long as we had cooperation.

6 And I said I didn't want a gotcha. I didn't want
7 to sit down in negotiations, talk about our preliminary
8 views of the merits, and then have, and be faced with the
9 argument that Giant Stadium says, well, obviously you know
10 the merits, you've had discussions with us on the merits,
11 you don't need anymore 2004 discovery. And I sought a
12 commitment from Giants that we wouldn't be faced with that
13 argument.

14 And the Court responded as follows, says, "You
15 don't even need that commitment because I'm going to give
16 you a gotcha from the bench, a no gotcha. If you choose to
17 have a conversation that could lead to some kind of
18 productive business-like resolution to this, doing that will
19 not constitute a waiver of any of your discovery rights or
20 your rights to continue with your investigation as you see
21 fit."

22 Now, I'd point out that at that time when the Court
23 gave us the assurance that, yes, we could enter into the
24 negotiations, so to speak, talk about the merits even though
25 we hadn't finished, that we weren't going to be faced with

1 exactly the argument we're being faced with today. Giant
2 Stadium stayed silent. They didn't raise their hand and
3 say, Your Honor, you can't do that, they're not entitled to
4 any discovery. They didn't say any of that. They stayed
5 silent.

6 THE COURT: Well, I understand what happened. I
7 actually remember it and my memory was further refreshed by
8 looking at the transcript. And I know that there's a point
9 that you've emphasized in your papers, and you're
10 emphasizing it again now.

11 But it's 14 months later. You've had some further
12 discovery, and you've had further business discussions, and
13 you've had a mediation session. Without going into the
14 substance of what was discussed in the various sessions, it
15 appears to me at least, that inevitably there has been a
16 sharing of information in positions by the parties, or there
17 could not have been open and good faith negotiations.

18 So today, almost Thanksgiving 2012, you must know
19 much more about the claims and the defenses to those claims
20 than you knew 14 months ago. It just seems to me impossible
21 that you are in effectively the same position today that you
22 were then.

23 So that's one concern I have relative to your
24 position. Another that I have is that Giant Stadium argues
25 in effect without using this hackneyed expression, what's

1 that they had an affirmative claim, they would assert it.
2 Lehman has not been shy about asserting such claims in the
3 past. Additionally, it seems fairly obvious that if Lehman
4 had sufficient information available to it that would
5 support not just a shotgun approach objection but a specific
6 and tailored objection to the claim, it would file it.

7 Throughout this case, Lehman has been active in
8 filing and pursuing objections to claims, and in fact, part
9 of this morning's agenda relates to objections to claims.
10 And so I view this as an exceptional case. And, in fact,
11 that was one of the reasons I asked a number of questions at
12 the outset to determine to what extent the issues that
13 related to this discovery dispute were exceptional and
14 unique, and to what extent this was just another example of
15 a derivatives dispute, this one happening to have the
16 negative gloss of active discovery disputes, as opposed to
17 active negotiations leading to a settlement.

18 I believe a continuing 2004 discovery under the
19 circumstances makes sense, although the fact that this is
20 occurring 14 months after our last discovery dispute is a
21 terribly negative fact. One conclusion to be drawn from the
22 mere timing of this, is that this dispute is taking too long
23 to resolve, and that despite best efforts, reasonable people
24 are unable to get to yes, and they should.

25 And so I'm going to propose that counsel meet and

1 confer in an effort to develop what I'll call a reciprocal
2 discovery protocol, and it is not necessarily limited to
3 2004. I believe that one of the things that distinguishes
4 the dispute that I've heard a lot about this morning from
5 other disputes, is that there is no foreseeable outcome here
6 in which Lehman is not objecting, or bringing affirmative
7 claims relief.

8 This is not a situation in which Lehman is engaging
9 in a 2004 process to later shake hands, and say here's the
10 money. I also believe even though everybody has denied this
11 that the 2004 dance that we're engaged in necessarily has
12 tactical aspects to it. And so here's what I am directing.

13 Between now and the first of the year, I would like
14 the parties to develop and agreed discovery protocol that
15 will be applicable whether we're dealing with 2004 discovery
16 or claims related discovery. It would be extraordinarily
17 wasteful for the discovery that's taken in 2004 to be
18 replicated again. And in the case of Ms. Prokopse, that's
19 already happening. Enough already.

20 I recognize that the 2004 sword is more properly
21 used by the debtor than by the creditor in this instance.
22 And so discovery from third parties and discovery from Giant
23 Stadium and discovery from Goal Line may be more appropriate
24 than discovery from the debtor. But that does not mean that
25 some discovery from the debtor is not also to be part of

1 this process.

2 One of the mysteries from the perspective of the
3 Court is that this third party discovery and discovery from
4 others is so critical from the debtor's perspective in being
5 able to formulate its own position with respect to the
6 claim. But I accept the representations made that ongoing
7 2004 discovery is needed in order for the debtor to complete
8 its investigation to use its words.

9 I would ask the parties to report the results of
10 these efforts at the December omnibus hearing. You don't
11 have to the point of an agreement, in fact, you could be to
12 the point of no agreement. I'd like to know that, in which
13 case I will then be able to either rule or take this matter
14 under advisement, but I have I think provided sufficient
15 guidance here to suggest that what I consider to be an
16 appropriate result is reasonable discovery going in both
17 directions with the understanding that the need for that
18 discovery is more obviously greater for the debtor. And
19 this is not an example of gotcha because I am indicating in
20 agreement that continued 2004 discovery is appropriate for
21 the debtor and the debtor's benefit.

22 I'm also noting the time's up in effect. This has
23 to come to a conclusion. And I don't expect there to be
24 another discovery dispute between the parties until there's
25 active litigation between you. And I hope that doesn't

1 occur at that point either. So I'll hear from you next
2 time.

3 MR. CLARK: Your Honor, just a question of
4 clarification. How does the January 1st deadline fit with
5 the next omnibus hearing? I'm not --

6 THE COURT: I don't know.

7 MR. CLARK: Okay.

8 THE COURT: I'm just looking for a status report at
9 the next omnibus hearing. And if it doesn't fit well for
10 the parties, it can always be put off, and then we can make
11 that a telephone conference.

12 MR. CLARK: Thank you, Your Honor.

13 MS. MARCUS: Your Honor, the December hearing is
14 December 19th.

15 THE COURT: 18th?

16 MS. MARCUS: 19th.

17 THE COURT: That seems like a perfect date for a
18 status report.

19 MR. MARGOLIN: The omnibus hearing is on December
20 12th, Your Honor.

21 THE COURT: Why am I hearing different dates?

22 MS. MARCUS: Sorry. Sorry, Your Honor. December
23 12th, sorry about that.

24 THE COURT: December 12th is a perfect date, too.
25 Either one's fine.